IN THE

Court of Appeals of Maryland

SEPTEMBER TERM 1970

No. 364

ELINOR H. KERPELMAN,

Appellant,

vs.

MARVIN MANDEL, Governor, LOUIS L. GOLDSTEIN, Comptroller of the Treasury, and JOHN LUETKEMEYER, Treasurer; constituting the BOARD OF PUBLIC WORKS OF MARYLAND, JAMES B. CAINE, INC., a Maryland Corporation, and MARYLAND MARINE PROPERTIES, INC., a Maryland corporation,

Appellees.

Appeal from the Circuit Court of Worcester County

(PRETTYMAN, J.)

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF THE CASE

This is an appeal from a judgment of the Circuit Court for Worcester County, Maryland, filed August 31, 1970, which was expanded and/or amended on September 22, 1970, (but the whole judgment of August 31, 1970, was appealed from) in which the Court entered a judgment dismissing the Appellant's Bill of Complaint for a Mandatory Injunction and for Declaratory Relief, as to all Defendants.

It is from the Order of August 31, 1970, expanded and amended on September 22, 1970, from which this appeal is entered against all Appellees, including James B. Caine, Inc., who has ostensibly been let out by Chief Judge Hammond.

QUESTIONS PRESENTED

1. Did the alienation of wetlands by the Board of Public Works of Maryland, and dismissal of the Bill of Complaint below amount to a taking of property of the individual Plaintiff, or of the class which she represents, without Due Process of Law in violation of the Fourteenth and Fifth Amendments to the United States Constitution, and in violation of the Ninth Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment?

2. Are submerged lands covered by navigable waters alienable by the State, or inalienable as part of the *jus publicum*?

3. Are they inalienable under a trust theory generally?

4. Are they inalienable under a trust theory under the circumstances alleged in this Bill of Complaint?

5. Did alienation under the circumstances alleged in this Bill of Complaint violate rights of the Plaintiff under the Fifth and Fourteenth Amendments, and the Ninth Amendment, to the Constitution of the United States?

6. Are the lands inalienable under the Maryland Constitution, and the Common Law of England which is in effect now in this State; or under Article 6, of the Declaration of Rights of Maryland?

STATEMENT OF FACTS

See the Bill of Complaint in the Appendix, pages 1 to 4; the allegations of the Bill of Complaint are here incorporated by reference.

It is undisputed, under the pleadings in this case, that certain submerged lands under navigable waters of this State in Worcester County, were conveyed by the Board of Public Works of Maryland, to certain real estate developers, for the purpose of filling the lands with mud and other substances, including buyers, so that they would become more or less dry land, and make for the developers millions of dollars.

These lands are, to coin a popular phrase, ecologically valuable, and continued filling of such similar lands in such similar manner, will be, in the long run, economically disastrous to the State and will change the quality of life for Mrs. Kerpelman and other citizens of the State, and of the Class Plaintiffs, traumatically downward, and perhaps diastrously so, if allowed to continue in other instances and in behalf of other potential millionaires, whose economic pressure and political campaign contributions, notoriously outrank those of many individual citizens, but whose cumulative interest in dollars alone, however, not even considering factors which are immeasurable in dollars, does not measure up to the cumulative interest of the citizens-in-common of the State who are represented as Class Plaintiffs in the suit.

ARGUMENT

I

The *Jus Publicum* is Inalienable

The Plaintiff's principle argument is based on the case of *Commonwealth of Virginia vs. City of Newport News* (1932), 164 S.E. 689, at 696.

The theory of that case is as follows, quoting from the case:

> "Insofar as the sovereignty and governmental powers of the state are concerned, the object of the ordination of the Constitution is to provide for the exercise thereof *and not the abdication thereof. It would therefore be a perversion of the Constitution to construe it as authorizing or permitting the Legislature or any other governmental agency to relinquish, alienate, or destroy, or substantially impair the sovereignty, or the sovereign rights, or governmental powers of the state. The police power, the power of right of eminent domain, and the power to make, alter and repeal laws are all attributes or inherent and inseparable incidents of sovereignty and the power to govern.* For this reason, although no express provision may be found in a State Constitution forbidding the Legislature to surrender, alienate, abridge, or destroy these powers, there is always such a limitation to be implied from the object and purpose for which the Constitution was ordained. Of course, such sovereign powers must be exercised subject to such limitations upon exercise thereof by the Legislature as are provided in the Constitution.
>
> "When we come to consider the powers of the state Legislature under the Constitution with reference to the *public domain,* it is necessary to take cognizance of the two different basic rights which the state has over and in the public domain.
>
> "*As sovereign, the state has the right of jurisdiction and dominion for governmental purposes over all the lands and waters within its territorial limits, including tidal waters and their bottoms. For brevity this right is sometimes termed the jus publicum.* But it also has, as proprietor, the right of private property in all the lands and waters within its territorial limits (including tidal waters and their bottoms) of which neither it nor the sovereign state to whose rights it

has succeeded has divested itself. This right of private property is termed the jus privatum. *Farnum on Waters and Water Rights,* S. 10, S. 36a; *Gough vs. Bell,* 21 N.J.Law, 156; *City of Oakland vs. Oakland,* etc. Co., 118 Cal. 160, 50 P.277.

"*The jus publicum and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the state. Therefore, by reason of the objects of purposes for which it was ordained, the Constitution impliedly denies to the Legislature the power to relinquish, surrender, or destroy, or substantially impair the jus publicum, or the rights of the people which are so grounded therein as to be inherent and inseparable incidents thereof, except to the extent that the State or Federal Constitution may plainly authorize it to do so. Farnham on Waters and Water Rights,* S. 10, S. 36a; *Illinois Cent. R. Co. vs. Illinois,* 146 U.S. 387, 455, 13 S.Ct.110, 36 L.Ed.1018; *Gough vs. Bell,* 21 N.J.Law, 156. See, also, Greenleaf's edition of Cruise on Real Property, vol. 2, p.67, note.

"On the other hand, the power of disposition is of the very essence of the proprietary right of the state, its *jus privatum.* Therefore no implication against the exercise by the Legislature of the power or right to alienate and dispose of the lands and waters of the state can arise from the object and purpose, for which the Constitution was ordained, *except such as arises from the existence and inalienability of the jus publicum.*

"*From this, however, necessarily arises this limitation. The Legislature may not by the transfer, in whole or in part, of the proprietary rights of the State in its lands and waters relinquish, surrender, alienate, destroy, or substantially impair the exercise of the jus publicum.* Or, to state it differently, the Legislature *may not make a grant of a proprietary right* in or authorize, or permit the use of, the public domain, including the tidal waters and their bottoms, except subject to the jus publicum. . .

"See also *Illinois Cent. R. Co. vs. Illinois,* 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed.1018."

Emphasis has been supplied throughout for the assistance of this Honorable Court's efforts.

SUMMARY OF MAIN ARGUMENT

II

A Constitutional Amendment Would Be Necessary to Alienate These Lands

Rights held *jus privatum* then (see above), are alienable, but rights *jus publicum* are part of the sovereignty given over by the people to the state. They cannot be altered by statute, as the Legislature has no right to impair the sovereignty or sovereign rights. Rights of navigation are immemorially included. So, we contend, are rights "environmental" in nature. In either case, submerged lands could not be relinquished, except by CONSTITUTIONAL AMENDMENT by the people.

The English law as it prevailed in 1776 continues to be the law of Maryland, subject however, to the statutes of this State thereafter enacted *subject to Maryland constitutional provisions. In re Continental Midway Corp.* 185 F. Supp. 867. The *Newport News Case* is the anchor of this theory—that the *jus publicum* is constitutionally reserved.

III

Amendment Nine, U.S. Constitution

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

IV

Illinois Central v. Illinois

In *Illinois Central Railroad Co. vs. Illinois, supra,* the Court said, at page 1040:

> "We shall hereafter consider what rights the company acquired as a riparian owner from its acquisition of title to lands on the shore of the lake, . . .
>
> 'We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks and other works therein as it may deem proper for its interest in it's business. The claim is founded upon the third section of the act of the Legislature of this State passed on the 16th of April, 1869, the material part of which is as follows:
>
> > "Section 3. (The Illinois Central Railroad Co. is given) . . . all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater . . . (and these) . . . are hereby granted in fee to said Illinois Central Railroad Company, its successors and assigns."
>
> 'The questions presented relate to the validity of the sections cited of the act . . .
>
> '. . . As to the grant of the submerged lands, the act declares that all the right and title of the State in and to the submerged lands constituting the bed of Lake Michigan, . . .
>
> "are granted in fee to the railroad company, its successors and assigns".
>
> 'This clause is treated by the counsel of the company as an absolute conveyance . . . as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the state. Treating it as such a convey-

ance, its validity must be determined by the consideration whether the Legislature was competent to make a grant of this kind . . .

'The question . . . is whether the Legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; . . .

'That the state holds title to the lands under the navigable waters of Lake Michigan within its limits, in the same manner that the state holds title to soils under tide water, by the Common Law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are opened to pre-emption and sale. *It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, free from the obstruction or interference of private parties.*

'The interest of the people in the navigation of the waters, and the commerce over them, may be improved in the instances by the erection of wharves, docks, and piers therein, for which purposes the state may grant parcels of the submerged lands; and so long as the disposition is made for such purposes, no valid objections can be made to the grants . . . And grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjusted cases as a valid exercise of legislative power consistent with the trust to the public upon which such lands are held by the state . . . The trust devolving upon the state or the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can *never* be lost , . . .''

Thus the Maryland statute, by the test of *this* case, if the court chooses to follow this Supreme Court case, is unconstitutional, in allowing the Board of Public Works to dispose of any lands simply for a consideration which it deems to be adequate, when the test must be, under the dictates of this case, whether the alienation will produce *any substantial impairment of the public interest in the lands and waters remaining, regardless of the consideration.*

Continuing, in *Illinois Central vs. Illinois,* at page 1043:

> "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of navigation and use of the waters, parcels can be disposed of without impairment of the public interest in what remains, *than it can abdicate its police powers in the administration of government and the preservation of the peace* . . . So with trusts connected with public property, or property of a special character like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state . . .
>
> "The idea that its Legislature can deprive the state of control over its bed and place the same in the hands of a private corporation created for a different purpose and limit it to transportation of passengers and freight between distant points and the city is a proposition that cannot be defended."

And quoting Chief Justice Taney (a Marylander yet), the Court went on to say:

> "The sovereign power itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a

grievance which never could be long borne by a free people.

"Many other cases might be cited wherein it has been decided that the bed or soil of navigable waters is held by the people of the state in their character as sovereign in trust for the public uses for which they are adapted. *Martin vs. Waddell*, 41 U.S. 16 . . . (Other citations)."

Then the Court went on to speak of the *jus privatum* and *jus publicum.*

V

The Illinois Central Railroad's Fare Is Reduced for the Trip to Worcester County

All of the above, the Worcester County Court cavalierly dismissed with a wave of the hand and the statement that . . . "Unless the law in force in the State of Maryland in which the Appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction is neither persuasive nor controlling." (! ! !)

Not Persuasive? Obviously not in Worcester County; controlling—well, does the Supreme Court control in Worcester County? Some think not, some think yes. Some love anarchy, especially in the innocent guise of "conservatism", and so seems the Honorable Court below.

Then, after dispensing thus of Supreme Court holdings, Judge Prettyman with the wave of his other hand, states that:

"The individual states inherited the sovereignty over lands under navigable waters within the state, and granted unto them (sic) control and regulation of riparian rights, which the states were free to alienate . . ."

VI

"Riparian Rights"; Worcester County Style

Like a true Worcester Countian, the Judge assumes that "riparian rights" means the right to do everything, including dredging, filling, swiping all the oysters, building a housing development all the way out to the other shore, or paving over the whole bay.

The most fundamental perusal of Black's Law Dictionary, or of *Shively vs. Bowlby, infra,* will indicate, however, that riparian rights is a very exact and fixed term, which does not include any of these things, and includes very little more, if anything, than the right to "wharf out" to the deep portion of the stream, and to have continued access at all times to the navigable waters in front of the owner's property. See also Illinois Central Railroad on riparian rights.

This new and modern transmutation of that phrase into absolute control is a thought fond to the hearts of developers and Eastern Shoremen, [redacted]s, but is not in accord with the state of the law now nor ever.

VII

Judge Prettyman's Willing Delight

Similarly, the learned jurist from Worcester County seems to find support for his amazing proposition in *Shively vs Bowlby,* 14 S.Ct. 548, 152 U.S. 1. He states that he "willingly and delightedly" adopts that decision. He states that the case "establishes the proposition that, consistent with the Common Law of England, the individual states inherited the sovereignty over lands under navigable waters within the state, and granted unto them (sic) control and regulation of riparian rights, which the states

were free to alienate according to the constitution and statutes of the respective states." (Part of this remarkable passage was quoted before.)

It is hard to understand how the proposition can be stood on its head so!

There is, indeed, in *Shively vs. Bowlby,* language slightly similar to that quoted above.

It is the following (at page 58, column 1, of 152 U.S.):

> "In common law, the title and dominion in lands flowed by the tide were in the King, for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, *charged with a like trust,* were vested in the original states, within their respective borders, subject to the rights surrendered by the Constitution to the United States."

Compare also the following in *Illinois Central vs. Illinois, supra* at 1042 of 146 U.S.:

> "The State holds the title to the lands under . . . navigable waters . . . But it is a title different in character from that which the State holds in lands intended for sale.
>
> ". . . It is a title held *in trust* for the people of the State that they may enjoy the navigation of the waters."

Illinois too had passed a Statute in derogation of the Common Law!! See p. 1041 of 146 U.S. col. 1 par. 2.

The learned jurist below seems to not understand what "in trust" means. Or perhaps he didn't see the words there. To err is human, to be an Eastern Shoreman, divine.

The learned Court below stated that in *Shively vs. Bowlby,* it was "determined that the United States had no power to make such a grant, because the Federal Government held the land in trust, pending the formation of a new

state. If one will read the last ten paragraphs of that Opinion, the thrust of the entire Opinion will become most evident."

One reads, in one of the last ten paragraphs, then, the following:

> "Upon the American Revolution, these rights, *charged with a like trust* were vested in the original states. . ."

The trust was similar to that under which the King held the *jus publicum.*

None other.

Not the type of trust under which an Eastern Shoreman holds property from the edge of the Atlantic Ocean all the way across to the banks of the river Clyde.

VIII

Statutes in Derogation of Common Law Strictly Construed

Furthermore, Sutherland on Statutory Construction, 3rd Ed., (1970 Cumulative Supplement), states, in Chapter 62, "Statutes in Derogation of the Common Law", Section 6201, that:

> "Where it is claimed that a statute imposes a duty or burden, or establishes a right or benefit which was not recognized by the common law, the statute will be given a strict interpretation to avoid the change asserted."

Citing 67 Md. 139, *U.S. Casualty Co. vs. Byrne.*

> "This rule of statutory interpretation has received wide adoption, . . ."

Citing Pound, Common Law and Legislation (1908), 21 H.L.R. 383. In that article, Professor Pound states:

"The 'natural rights doctrine' has been repressed both in England and the United States, but statutes changing the common law, or imposing upon the 'common right' have continued to receive a strict construction."

IX

Constitutional Amendment Necessary

In short, a constitutional amendment would be necessary to allow the state to dispose of land held in the capacity *jus publicum*. A mere statute, such as, Section 15 of Article 78A cannot accomplish this.

The State has given away then, that which was not the State's to give away.

Thus, property of the Appellant, which is owned in common with all other citizens of the State, was taken from her without either amendment of the State Constitution, or any other Due Process of Law required by the Fifth and Fourteenth Amendments to the United States Constitution; rights reserved in her in common with other citizens of the State under the Ninth Amendment to the Constitution of the United States were taken away from her by the action of the Worcester County Court and the Board of Public Works, in taking away this property owned by her, with a commonality of title, together with all other citizens of the State.

Further arguments, it is respectfully suggested, may be found in the "Plaintiff's Memorandum of Law", which has been filed in the case, but which is far too extensive to reprint here, the Appellant's finances being what they are. Copies for the Court have been filed.

Additional copies may be obtained from counsel for the Appellant at $2.40 each.

CONCLUSION

Wherefore, the Appellant respectfully prays that the Judgment and Order of the Circuit Court for Worcester County dismissing the case as to all Defendants, on August 31, expanded and amended on September 22, be reversed, and that the case be remanded for further proceedings.

Respectfully submitted,

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APPENDIX

BILL OF COMPLAINT FOR A MANDATORY INJUNCTION, AND FOR DECLARATORY RELIEF

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes Elinor H. Kerpelman, your Complainant, by Leonard J. Kerpelman, her Solicitor, and says:

1. That she is a taxpayer of the State of Maryland, and a resident thereof, in Baltimore City; this suit is brought on her own behalf, and on behalf of all others similarly situated.

2. The Defendant Board of Public Works of Maryland, hereinafter sometimes referred to as "Board of Public Works" or "Board", is charged by law, in Article 78A, Section 15 of the Annotated Code of Maryland, with the authority to dispose of lands of the State of Maryland by sale or otherwise *providing* this is done for "a consideration adequate in the opinion of the Board of Public Works . . ."; but also, by Article 6 of the Declaration of Rights of the Maryland Constitution, the Defendant Board Members, individually are "Trustees of the Public", in all that they do, and must reasonably exercise this fiduciary charge, particularly as to their stewardship of property.

3. In 1968, contrary to said Article 6 Trusteeship, and without the necessary opinion as to adequacy, the Defend- and Board of Public Works, then composed in part of different membership, but being the same constitutional and statutory Board as the present Defendant Board, conveyed 190 acres of lands which were then the property of the people of the State of Maryland, unto the Defendant James B. Caine, Inc.; and unto the Defendant Maryland Marine Properties, Inc., 197 acres of Maryland lands; or did so by mesne conveyances both for a totally inadequate and insufficient consideration, compared with the then fair market value or intrinsic value of the said lands, and the said Board then had no opinion upon the monetary adequacy

of the consideration proffered, or had a mistaken, unreasonable, or totally false opinion of such adequacy, that said conveyances, to the other Defendants respectively were therefore illegal, void, and a nullity as not complying with the necessary precondition set forth as to adequacy in said Art. 78A, Sec. 16; and as a violation of the Trusteeship imposed by Article 6 of the Declaration of Rights. The consideration for the said conveyances was also totally inadequate and insufficient considering the ecological consequences of the sale, and the direct consequent effect upon the natural resources of the State of Maryland, which are owned by the Complainant and all others similarly situated, and which are held in trust for her and the class which she represents in the within suit by the State of Maryland and its public officials including the Defendant Board.

4. The said lands referred to in paragraph 3 hereof, lay in Worcester County, and were marshlands and wetlands, which is to say, submerged and partially submerged lands, marshes, and shallows, peculiarly adapted to the production of certain important forms of marine life, and constituting an important link in the food chain of many economically valuable wild species of fish, animal and bird life, which abound in Maryland, and upon her waters, and which are owned in common, and used by all of the members of the class on whose behalf this suit is brought.

5. Said lands which were conveyed are intended to be, and are being, filled in and built up by those to whom they were conveyed, and their character as wetlands and marshlands is being completely obliterated, with the consequent destruction of support to said fish and animal species aforesaid referred to in pargaraph 4.

6. The lands aforesaid which were sold to Maryland Marine Properties, Inc., were sold by an exchange for other marshlands and wetlands, which are cumulatively only one-half as productive of the important species of marine life and products as those which were conveyed to the said Maryland Marine Properties, Inc.; those sold to the defendant James B. Caine, Inc., were sold for a completely

and totally inadequate money consideration, namely one hundred dollars per acre. Said lands which were sold to Maryland Marine Properties, Inc., were exchanged for wetlands and marshlands as aforesaid worth only $41,000.00, while the lands conveyed to it were worth two hundred times as much in fair market monetary value; the lands conveyed to James B. Caine, Inc. were worth approximately five hundred times as much in fair market monetary value as the monetary consideration received by the Defendant Board of Public Works.

7. Said monetary consideration paid to Maryland was, in each case, so completely and totally inadequate as was known to all parties at that time as to amount to a conveyance of the land by the Defendant Board of Public Works fraudulently, or by mistake, or by undue influence exerted upon it.

8. The Complainant and all other similarly situated, will be irreparably injured and damaged and have been so, by the said conveyances to the defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., in that valuable property, which is ecologically irreplaceable, owned by them or held in trust for them by the Defendant Board of Public Works, has been disposed of, and closed off to the wild natural resource cycle which it was a most essential, irreplaceable part of, and the Complainant and all others similarly situated are deprived of their use and benefit, which they otherwise would have, in return for a totally inadequate consideration and in return for a totally inadequate contribution by new owners of the said lands into the state treasury by way of real estate taxes paid and to be paid, the value of which taxes will never compensate for the deprivation of said lands and the irreparable damage and injury which will be caused to the natural products and natural resources of the State of Maryland by the ecological disruption caused by the filling and loss of said wetlands, marshlands and shallows; which disruption may reasonably be expected to cause or substantially contribute to, natural resource and wildlife losses of many millions of dollars measured in financial terms alone.

9. The Defendant corporations and proceeding with great speed to fill in and eradicate as marshland and wetland, the lands in question.

10. The Complainant has no adequate remedy at law.

WHEREFORE, the Complainant prays:

(a) That this case be advanced on the Court Docket for immediate trial, and hearing on any motions which may be filed.

(b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., to reconvey to the State of Maryland, those lands in Worcester County, which are the subject of the within suit.

(c) That the Court declare the Deeds of Conveyance or mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc., and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland.

(d) That the Complainant may have such other and further relief as the nature of her case may require.

AND, AS IN DUTY BOUND ET CETERA.

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ELINOR H. KERPELMAN

DEMURRER OF DEFENDANT MARYLAND MARINE PROPERTIES, INC.

Defendant, Maryland Marine Properties, Inc., by its attorneys, Raymond D. Coates, Thomas P. Perkins III and Robert A. Shelton, demurs to the Bill of Complaint filed by

Plaintiff, Elinor H. Kerpelman, herein and to each and every paragraph thereof and as grounds for said Demurrer states as follows:

1. Plaintiff has totally failed to allege any facts which would be sufficient to constitute a cause of action or entitle her to the relief as prayed in the Bill of Complaint.

2. Plaintiff has totally failed to allege sufficient facts to establish her standing to sue in this case.

3. Plaintiff is barred by laches.

4. Such other and further grounds as will be set forth at the hearing on this Demurrer.

WHEREFORE, Defendant, Maryland Marine Properties, Inc., prays that this Honorable Court sustain its Demurrer without leave to amend, that the Bill of Complaint be dismissed as against Defendant, Maryland Marine Properties, Inc. and that Defendant be awarded its cost of this suit.

/s/ Raymond D. Coates
/s/ Thomas P. Perkins, III
/s/ Robert A. Shelton

MOTION NE RECIPIATUR TO DEMURRER OF MARYLAND MARINE

The said "Demurrer", and paragraph number 3 thereof, states "Plaintiff is barred by laches"; the defense of "laches", is a factual defense, and has no proper place in a demurrer; the Plaintiff being confronted by a demurrer containing such material knows not how to meet the matter to be presented upon argument or briefing, and is unable therefore to reasonably prepare for the presentation of his defense to the demurrer.

LEONARD J. KERPELMAN
Attorney for Plaintiff

DEMURRER OF BOARD OF PUBLIC WORKS

The Board of Public Works, a Defendant, by Francis B. Burch, Attorney General, Jon F. Oster, Assistant Attorney General, and Richard M. Pollitt, Special Attorney, its attorneys, demurs to the Bill of Complaint and to each and every paragraph thereof because:

1. The Bill does not state a cause of action.

2. The Bill does not allege facts amounting to a cause of action.

3. The Bill does not allege facts sufficient to support the relief prayed.

4. Article 78A, Section 15 of the Annotated Code of Maryland (1965 Replacement Volume) provides:

> "Any real or personal property of the State of Maryland or of any board, commission, department or agency thereof, and any legal or equitable rights, interests, privileges or easements in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any board, commission, department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public Works, or to any county or municipality in the State subject to such conditions as the Board of Public Works may impose. If said real or personal property of the State of Maryland, disposed of hereunder, or any legal or equitable rights, interests, privileges or easements in, to, or over the same is under the jurisdiction or control of any board, commission, department or other agency of the State, the deed, lease or other evidence of conveyance of any such property or right or interest therein, disposed of hereunder, shall be executed on behalf of such board, commission, department or agency of the State, by the highest official thereof, and by the Board of Public Works, and if any of said real or personal property or any legal

or equitable rights, interests, privileges or easements in, to, or over the same, disposed of hereunder, is not under the jurisdiction or control of any particular board, commission, department or other agency of the State, the deed, lease or other evidence of conveyance of said property or interest therein shall be executed by the Board of Public Works only; provided, however, that whenever any State department, agency or commission leases State-owned property under its jurisdiction and control to any State employee, agent, servant or other individual in State service for purposes of permitting such person to maintain a residence therein, such lease shall be executed by the department, agency or commission having such control or jurisdiction over such property, and, additionally, shall be approved by the budget Director, which approval shall be a condition precedent to the validity of the lease. All such conveyances shall be made in the name of the State of Maryland acting through the executing authority or authorities herein provided for. As used herein, the term 'real or personal property or any legal or equitable rights, interests, privileges or easements in, to, or over the same, shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land. If the consideration received for the disposition of any real or personal property or interest therein is other real or personal property, such property so received shall be held and accounted for in in the same manner as other property within the jurisdiction and control of the board, commission, department or other agency of the State receiving such property. If the consideration received for any such disposition is cash, in whole or in part, the proceeds shall be accounted for and remitted to the State Treasurer; except that any consideration received in cash for the disposition of an asset of a substantial per-

manent nature, commonly called a capital asset, shall be applied solely to the State Annuity Bond Fund Account for the payment of the principal and interest of the bonded indebtedness of the State and if such capital asset shall have been originally purchased with any special funds, the proceeds thereof shall revert to such fund only.''

Said statute imposes no limitation upon the power of the Board of Public Works to dispose of the property which is the subject of this suit, and the Board was authorized as a matter of law to dispose of the property complained about.

5. There is no allegation that the alleged alienation of State property was not ''for a consideration adequate in the opinion of the Board of Public Works'' as provided in the statute.

6. There is no allegation that the procedure of the Board of Public Works in connection with its disposition of the subject property was improper, defective or in any manner contrary to law.

7. The exercise of discretion of an administrative agency, if it acts within the scope of its authority, is not subject to review by a court of equity unless its power is fraudulently or corruptly exercised. *Hanna v. Bd. of Ed. of Wicomico Co.*, 200 Md. 49.

8. And for other reasons to be shown at the hearing of this Demurrer.

FRANCIS B. BURCH
Attorney General
JON F. OSTER
Assistant Attorney General

RICHARD M. POLLITT
Special Attorney

Attorneys for Defendant
Board of Public Works

MOTION RAISING PRELIMINARY OBJECTION

James B. Caine, Inc., one of the Defendants, by Sanford and Bolte, its Solicitors, moves this Court pursuant to Rule 323 (A) (1) of the Maryland Rules for an Order dismissing the Bill of Complaint filed herein and as grounds for this Motion alleges that this Court lacks jurisdiction over the subject matter of said Bill of Complaint, since it involves a political question and not a justifiable question.

SANFORD AND BOLTE

ANSWER TO MOTION RAISING PRELIMINARY OBJECTION

Now comes Elinor H. Kerpelman, by Leonard J. Kerpelman, her solicitor and for answer to Motion Raising Preliminary Objection, says:

1. That questions raised by the Bill of Complaint are, substantially, two:

   A. The Board of Public Works of Maryland alleged to convey lands which it had no alienable title to, to the other Defendants.

   B. The conveyance was for such a completely and totally inadequate consideration, that the Board of Public Works could not have had a bona fide opinion that the consideration was adequate, and therefore fraud is inferred by the Complainant.

2. It is not seen how, in any sense A, could be said to be a political question by any stretch of any except of most fertile imagination question B could be so; however, it is denied, to be perfectly clear and explicit, that either is a "political question".

LEONARD J. KERPELMAN
Attorney for Complainant

MOTION FOR SUMMARY JUDGMENT UPON SOME ISSUES

Now comes Elinor H. Kerpelman, Plaintiff, by Leonard J. Kerpelman, her Attorney, and says:

That there is no dispute as to any material fact concerning the following issues in the above-entitled case:

a. That she is a taxpayer of the State of Maryland.

b. That she is a resident thereof in Baltimore City.

c. That this suit is brought on her own behalf, and on behalf of all others similarly situated.

LEONARD J. KERPELMAN
Attorney for Plaintiff

DEMURRER OF DEFENDANT JAMES B. CAINE, INC.

James B. Caine, Inc., one of the Defendants, by Sanford and Bolte, its attorneys, demurs to the Bill of Complaint filed herein and to each and every paragraph thereof, and as grounds for said Demurrer states as follows:

1. Plaintiff has totally failed to allege any facts which would be sufficient to constitute a cause or action or entitle her to the relief as prayed in the Bill of Complaint.

2. Plaintiff has totally failed to allege sufficient facts to establish her standing to sue in this case.

3. Plaintiff is barred by laches.

In support of said Demurrer, this Defendant adopts the arguments heretofore made by the other Defendants herein, and also the Opinion of this Honorable Court relating to such Demurrers, which is dated August 31, 1970 and filed in this proceeding.

WHEREFORE, Defendant James B. Caine, Inc. prays this Honorable Court to sustain its Demurrer without leave to amend, to the end that the Complainant pay the costs of this proceeding.

SANFORD AND BOLTE

OPINION AND ORDER OF COURT [AUG. 31, 1970]

This is another one of those cases in which rulings required upon pleadings now before the Court for determination can obscure the principal issue presented to the Court at the time of the Hearing on the pleadings on May 11, 1970.

On September 30, 1969, the Complainant filed a "Bill of Complaint For A Mandatory Injunction, And For Declaratory Relief". Upon the reading of the Bill, however, and the prayers for relief, it becomes apparent that the complaint does not actually state a typical cause of action as usually embraced in a petition for a declaratory decree or declaratory judgment. In other words, the Bill does not actually seek a declaration of rights of the parties, but seeks the specific relief as requested in the said prayers, the contents of which follow:

"WHEREFORE, the Complainant prays:

(a) That this case be advanced on the Court Docket for immediate trial, and hearing on any Motions which may be filed.

(b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., to reconvey to The State of Maryland those lands in Worcester County which are the subject of the within suit.

(c) That the Court declare the Deeds of Conveyance or Mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc., and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland."

To this Bill of Complaint, the Defendant Maryland Marine Properties, Inc. filed its Demurrer on October 20, 1969, together with an extensive memorandum raising three

specific issues; namely, (1) a failure to allege sufficient facts to constitute a cause of action, (2) attacking the standing to sue of the Plaintiff, and (3) raising the question of laches. On October 21, 1969, the Defendant Board of Public Works filed its Demurrer citing the provisions of Section 15 of Article 78A of The Annotated Code of Maryland, and the authority of the Board of Public Works of Maryland as therein set forth, contending that, in the absence of any allegation of fraud or the facts supporting such an allegation, no cause of action was sufficiently stated to subject the actions of the Board of Public Works to the scrutiny of a Court of Equity.

On October 21, 1969, James B. Caine, Inc., one of the Defendants, filed a "Motion Raising Preliminary Objection", alleging the lack of jurisdiction of this Court over the subject matter of the Bill, on the grounds that a determination involved a "political question", and "not a justiciable question".

On November 6, 1969, the Complainant filed a "Reply To 'Memorandum of Law of Maryland Marine In Support of Demurrer' ".

On November 7, 1969, the Complainant filed a "Motion Ne Recipiatur To Demurrer Of Maryland Marine", based upon contention that the Demurrer raised a question of laches which should be considered as a factual defense rather than a subject of a demurrer.

On November 17, 1969, the Complainant filed an "Answer To Motion Raising Preliminary Objection", denying the nature of the question to be "political", and summarizing the contentions of the Bill as being (a) that the Board of Public Works enjoyed no alienable title to the lands in question, (b) that "[t]he conveyance was for such a completely and totally inadequate consideration, that the Board of Public Works could not have had a bona fide opinion that the consideration was adequate, and therefore fraud is inferred by the Complainant".

On January 26, 1970, an organization allegedly known as "North American Habitat Preservation Society" filed a

"Petition To Intervene As Plaintiffs", upon which the Court issued a Show Cause Order to the Defendants ordering them to show cause on or before February 16, 1970, if any they had, why the said Petition to Intervene should not be granted. The Defendant Maryland Marine Properties, Inc., filed its Answer to the Petition to Intervene, on February 24, 1970, alleging insufficient facts to establish the standing of the Petitioners to sue. On February 27, 1970, the Defendant, James B. Caine, Inc., filed a "Motion Ne Recipiatur As To Petition To Intervene As Plaintiffs", alleging the non-receipt of a copy of the said Petition, the existence of which the attorney for the said Defendant allegedly accidentally discovered in the office of the Clerk of this Court, on February 24, 1970.

On March 11, 1970, the Complainant filed a "Motion Ne Recipiatur" to the Motion Ne Recipiatur of the Defendant James B. Caine, Inc., founded upon the grounds that the Caine Motion was based upon "facts not apparent from the face of the record, and yet was not under affidavit". Interestingly enough, no copy of the Complainant's Motion Ne Recipiatur was apparently served upon the Defendant James B. Caine, Inc., or any of his attorneys until May 13, 1970, after which an amended certificate of mailing was apparently intended to be filed by the attorney for the Complainant on March 16, 1970.

On May 5, 1970, the Plaintiff filed a Memorandum of Law, the main body of which was a photo-copy of a memorandum filed, on September 15, 1969 in a similar case in the Circuit Court for Baltimore City.

On May 6, 1970, the Defendant James B. Caine, Inc., filed a "Memorandum In Support Of Preliminary Objection", the main body of which was a photo-copy of a brief filed in the same similar case in the Circuit Court for Baltimore City.

On May 11, 1970, the Complainant filed a "Motion For Summary Judgment Upon Some Issues", alleging "no dispute as to any material fact concerning the following issues"; namely, (a) [t]hat she is a taxpayer of the State of Maryland, (b) [t]hat she is a resident thereof in Balti-

more City, and (c) [t]hat this suit is brought on her own behalf, and on behalf of all others similarly situated."

The Hearing was held on May 11, 1970 on all Demurrers, Motions, Petitions, etc., consistent with the notice of the assignment thereof mailed to all parties on April 8, 1970.

On May 15, 1970, the Complainant filed as "Answer To Memorandum Of Law Of Defendant James B. Caine, Inc.", in which the Complainant suggested that "counsel has missed the point", because of the contention of the Complainant that "nobody" has an alienable title to the lands in question.

On June 17, 1970, the Complainant filed a "Supplementary Plaintiff's Memorandum Of Law", in which the Complainant stated to the Court that she was adopting the entire theory set forth in the case of Commonwealth of Virginia vs. City of Newport News, 164 S.E. 689, at page 696, and quoted from that case the theory upon which she relied.

Petition to Intervene

The first duty of the Court is obviously to dispose of the Petition to Intervene filed on behalf of the "North American Habitat Preservation Society", for whom Leonard J. Kerpelman, Esq. is "solicitor" as well as being the attorney for the Complainant. Based entirely upon the facts set forth in the said Petition as to the nature and composition of the said Society, and the interest which it has in this case, the Court has determined that it lacks standing to sue as a party Plaintiff, and therefore its Petition to Intervene would be denied. Horace Mann League vs. Board, 242 Md. 645, at page 652. Citizens Committee vs. County Commissioners, 233 Md. 398, Bar Association vs. District Title Co. 224 Md. 474, and Greenbelt vs. Jaeger, 237 Md. 456.

A certain R. Doyle Grabarck, Box 869, Adelphi, Maryland, 20783, has likewise joined as a Petitioner in the said Petition to Intervene, both as President of the said Society, and individually. As President of the Society, the Court would consider his capacity to sue to be co-existent with the Society, and of no greater magnitude. As an individual,

however, he is apparently in the same position as the Complainant, Elinor H. Kerpelman, and the determination as to her standing will likewise be determinative of the standing of Mr. Grabarck. It seems also to follow that a determination of the contentions and issues raised by the Complainant would likewise be determinative of the contentions and issues raised by Mr. Grabarck, particularly in view of the fact that each are represented by Mr. Kerpelman. Indeed, by paragraph 4 and 5 of the Petition to Intervene, the Petitioners have so stated, and have adopted the position of the Complainant. There is one major difference, however, between the Petitioner Grabarck and the Complainant Kerpelman. That difference is the fact that no where in the Petition to Intervene is it alleged that Mr. Grabarck is a taxpayer of the State of Maryland. The Petition to Intervene, therefore, by R. Doyle Grabarck, as an individual, will be, likewise, denied.

Motions Ne Recipiatur

The determination by the Court upon the Petition to Intervene, as hereinbefore set forth, makes unnecessary a consideration of the Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., or the Motion Ne Recipiatur filed by the Complainant to the Caine Motion Ne Recipiatur. It might be well for the Court to observe, however, that Counsel for the Complainant had due notice of the appearance of Lee W. Bolte, Esq., and the firm of Sanford and Bolte, on behalf of the Defendant James B. Caine, Inc., as early as October 21, 1969, upon the filing of the Caine Motion Raising Preliminary Objection. Mr. Kerpelman recognized this appearance in his service of November 4, 1969 of his "Reply", his Motion filed on November 7, 1969, and his Answer filed on November 17, 1969. He did ignore the appearance in his service of the said Petition to Intervene. The apparent failure of Counsel for Maryland Marine Properties, Inc., to receive a copy of the said Petition to Intervene is the fact that Mr. Kerpelman used an inadequate address therefor, according to his Certificate of Service, in that he omitted any reference to room numbers. The Clerk of this Court can hardly be held responsible for this

defect in view of the fact that in his undated Certificate of Service of the said Petition to Intervene, Mr. Kerpelman alleged service upon a certain "Joseph H. Young, Esq., 901 First National Bank Bldg., Baltimore, attorney for James B. Caine, Inc." The Clerk would have no way of knowing whether or not additional Counsel for the Caine Corporation was now in the case, and had simply failed to enter his appearance of record. Perhaps the Clerk, however, should be more careful, and require that the Certificate of Service by an attorney be dated, and that all attorneys of record be included within such Certificate.

Motion Raising Preliminary Objection

The Court should then next consider the preliminary objection raised by the Defendant James B. Caine, Inc., upon the question of whether or not the Bill of Complaint merely stated a political question, and not a justiciable issue. Granting that a reading of the Bill of Complaint would make it difficult to delineate a justiciable issue, and that the Bill appears to be more in the nature of a statement of a political position, requiring legislative attention or executive restraint, the memoranda subsequently filed on behalf of the Complainant have had the salutary effect of interpreting the meaning of the Bill of Complaint and articulating a position which presents a legal issue. In view of this subsequent elucidation, by counsel for the Complainant, the Court will entertain jurisdiction, and render a decision upon the issue as narrowly framed and presented to the Court by Complainant's Memoranda. The Motion of the Defendant James B. Caine, Inc., raising this preliminary objection will be overruled.

Motion Ne Recipiatur of Complainant to Demurrer of Maryland Marine Properties, Inc.

The Court will entertain the Demurrer of the Defendant Maryland Marine Properties, Inc., and deny the Motion Ne Recipiatur filed thereto by the Complainant. In his Motion Ne Recipiatur thereto, Counsel for the Complainant

has over simplified the law with regard to the inclusion of a charge of laches in a demurrer.

> "The defense of limitations or laches may be raised on demurrer where, on the face of the bill, it can be seen that it is a bar. Although, ordinarily, the defense of laches must be made by answer alleging facts showing lapse of time and prejudice to the Defendant, as discussed supra §142, where the bill on its face shows both lapse of time and circumstances as suggest prejudice or acquiesence and call for explanation, the bill is demurrable." 9 M. L. E. "Equity", Section 152, and cases therein cited, including the 1969 Pocket Part.

The Court will concede that the question of whether or not a case of laches is presented within the four corners of the Bill of Complaint is indeed a close one, but if the question of laches was the only question before the Court for determination in this proceeding at this time, the Court would insist upon a Hearing to spread the facts upon the record, particularly as they relate to prejudice to the Defendant Maryland Marine Properties, Inc. The Court, therefore, would take the position that it would not sustain the Demurrer on that grounds alone, but defer it as a matter of defense. Such a position by the Court, however, does not dispose entirely of the matter now for determination. The fact that a demurrer contains an invalid, unsupported or otherwise irrelevant issue, or the fact that the grounds assigned do not meet the approval of counsel for the opposing party or the Court does not justify the rejection of the pleading in toto. Even if one of the grounds assigned in a demurrer is found to be lacking in legal efficacy, the remaining grounds, if any there be, survive and are entitled to the consideration of the Court. Such is the situation presented here.

Demurrers

The Court is well aware of, and has had several opportunities to apply, the position of the Court of Appeals of Maryland with regard to demurrers filed in opposition to petitions for declaratory relief. Kelley vs. Davis, 233 Md.

494. As mentioned early in this Opinion, however, this Court does not envision the Bill of Complaint in this case to state the grounds for, or the request for, a declaration of the rights of the parties. The declaration which the Complainant seeks is merely a declaration to support the issuance of the "Mandatory Injunction" which she prays. In other words, it would be necessary to "declare" invalid the conveyances referred to within the Bill and in prayer for relief "(c)" in order to grant the relief prayed in "(b)" of the prayers for relief. There is no basis for, or necessity for, any other, further, or fuller declaration of rights of the parties. The Court is, therefore, of the opinion that the rule against entertaining a demurrer to a petition for declaratory relief is not appropriate to this particular proceeding, and should not be applied hereto.

The Court will attempt to state the position of the Complainants insofar as it presents a legal issue to be resolved herein. The Complainant adopts the position that title to lands under tidal waters vested in the King of England, for the benefit of the nations, passed to the Colonies under the Royal Charters granted therefor, in trust for the communities to be established, and upon the American Revolution, passed to the original States to be held by the officials thereof in trust for the people within the boundaries of the respective States, subject only to the rights surrendered by the Constitution of the United States to the Federal Government for the regulation of navigation. The trust which she envisioned is one which covers the entire jus publicum and vests in the trustee an irrevocable and inalienable title to such property. In support of her position in regard to such a trust, she narrowly construes the first portion of Article 6 of the Declaration of Rights of the Constitution of Maryland, of 1867, which reads:

> "Art. 6. That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public and, as such, accountable for their conduct: . . ."

She is further contending that such being the alleged common law of England, the General Assembly of Maryland, or apparently any Provincial legislature, is not, and

never has been, empowered or authorized to change or modify that common law. As authority for that provision, she cites a portion of the content of Article 5 of the Declaration of Rights of the Constitution of Maryland, of 1867, the portion which she cites being as follows:

> "Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, . . .".

At this point, perhaps it would be well that the Court quote the remainder of Article 5 of the Declaration of Rights, with the emphasis by underlining being supplied by the Court:

> "Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English Statutes as existed on the Fourth day of July, 1776; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, 1867; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; *subject, nevertheless, to the revision of, an amendment or repeal by, the Legislature, of this State.* And, the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore."

There is no substantial difference between that portion of the 1867 Constitution of Maryland and paragraph 3 of the Declaration of Rights of the First Constitution of Maryland, as reported by Kilty, Volume 1, The Laws of Maryland 1799 Edition. It reads as follows:

> "III. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration and which by experience have been found applicable to their local and other circumstances, and of such others as have been since

made in England or Great Britain, and have been introduced, used and practiced by the Courts of Law or Equity; and also to all acts of assembly in force on the first of June, 1774, except such as may have since expired, or have been, or may be altered by acts of convention, or this declaration of rights; *subject nevertheless to the revision of, and amendment or repeal by, the Legislature of this State*: and also the Inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore."

If, as Counsel for the Complainant has stated in his Supplementary Memorandum, the Court was impatient at the Hearing with the persistent argument of Counsel with regard to the elements of the Common Law doctrine, perhaps it was because of the clear exception in the Declaration of Rights as hereinbefore set forth, and the almost incontestable legal understanding that the Legislature of Maryland is at liberty, and in the conscientious performance of its duties, must, from time to time, change the Common Law through statutory enactments in order to meet the changing conditions of time and history. Lutz vs. State 167 Md. 12, Heath vs. State, 198 Md. 455, Goldenberg vs. Federal Finance, 150 Md. 298, 5 M.L.E. "Common Law", Section 3. The adoption of any proposition that would abrogate, nullify and destroy the great body of law in Maryland, including enactments of the General Assembly, except so much thereof as interpreted and applied the Common Law of England prior to 1776 and the treatment of subjects not contemplated by that common law, is so illogical, unreasonable, and disastrous in its consequences as to be almost incomprehensible. The Court supposes that this is the reason why the point had not been more frequently pressed upon the Courts of this State in the past.

The Court is indebted, however, to Counsel for the Complainant for urging upon the Court the controlling nature of the opinion of the Supreme Court of the United States in Shively vs. Bowlby, 14 Sup. Ct. 548, 152 U. S. 1. The Court willingly and delightedly adopts the decision therein to be

determinative of the issues presented by the Complainant for resolution in this proceeding. Unfortunately, Counsel for the Complainant has misread the case, and has appropriated wording from that case, out of context, to attempt to support the position of the Complainant herein.

That case establishes the proposition that, consistent with the Common Law of England, the individual States inherited the sovereignty over lands under navigable waters within the State, and granted unto them control and regulation of riparian rights, which the States were free to alienate according to the constitution and statutes of the respective States. In a most helpful and extensive treatment of the entire subject matter of riparian rights as they existed within the original thirteen states, and as, by virtue of that opinion, extended to the new states admitted into the Union thereafter, the Supreme Court, in Shively vs. Bowlby, has furnished a source of history of the treatment of riparian rights of enormous magnitude, and through its study, one is oriented to the broad spectrum, and range of treatment, of the subject by the individual States. This concept is fundamental if one is to now attempt to define and understand riparian rights within the United States. Available treaties, encyclopedic compendiums, and conclusions based upon summaries of annotations must be read and considered in the light of the cardinal principle that the decisions of the individual states are based upon the law as it had been established within the individual states, and unless the law in force in the State in which the appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction, is neither persuasive nor controlling.

If the strict trust theory proposed by the Complainant is the law in other jurisdictions, it is certainly not the law in Maryland. Without belaboring the issue with repetition of authorities recently enumerated and discussed by this Court in No. 8935 Chancery, the Court would merely observe that, beginning with the Acts of 1745 and continuing through the Acts of 1970, the Legislature of Maryland has recognized the existence of certain riparian rights in pri-

vate land owners. A long line of judicial decisions of the Court of Appeals of Maryland and Federal Courts interpreting Maryland Law, have protected, enforced, interpreted and arbitrated these rights, beginning, at least, in 1815, with The Wharf Case, reported in 3 Bland at page 361, and continuing through Causey vs. Gray, in 1968, reported in 250 Md. at page 380, and through November 12, 1969, in Western Contracting Corporation vs. Titter, reported in 255 Md. at page 581.

The most specific pronouncement of the General Assembly of Maryland, however, upon the narrow issue sought by the Complainant to be raised against The Board of Public Works of Maryland is contained in Section 15 of Article 78A of The Annotated Code of Maryland. Without quoting that lengthy section in full in this Opinion, since 1945, The Board of Public Works of Maryland has been granted specifically the following power:

> "Any real or personal property of the State of Maryland or of any Board, Commission, Department or Agency thereof, and any legal or equitable rights, interests, privileges or easements, in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any Board, Commission, Department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public Works, or to any county or municipality in the State subject to such conditions as The Board of Public Works may impose . . . As used herein, the term 'real or personal property or any legal or equitable rights, interests, privileges for easements in, to, or over the same' shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land . . ."

The language which Counsel for the Complainant has selected from Shively vs. Bowlby with regard to the imposi-

tion of a trust does not apply to the type of trust which the Complainant espouses. The factual situation in Shively vs. Bowlby presented the issue as to whether or not a purported grant from the United States of America, while the area was a territory under the jurisdiction of the Federal Government, took precedence over a grant by the State of Oregon for the same land. The Court determined that the United States had no power to make such a grant because the Federal Government held the land in trust pending the formation of the new State. If one will read the last ten paragraphs of the Opinion, the thrust of the entire opinion will become most evident. The type of trust referred to therein bears no resemblance to the type of trust here urged upon the Court.

The pleadings, memoranda, and arguments in this case have been filled with references to various possible disastrous consequences by the adoption of the position of one party or the other. The Court refuses to speculate, and does not base this Opinion upon any unproven allegations, either favorable or unfavorable to the Complainant, but, if one had the time, it might be an interesting mental exercise to conceive of replacing the shorelines of The State of Maryland to their composition and contour, and in all their pristine beauty, of the year 1634. Such would be the logical, if unreasonable, result should the theory of the Complainant be adopted, and the requested "Mandatory Injunction" issued by this Court.

Adapting, as she has, the theory of her cause of action, the Court can see no reasonably possible manner in which the Bill of Complaint can be amended to avoid its basic infirmity, nor any need for any further delay in granting an opportunity for such an amendment.

Having reached this decision in the matter, it becomes unnecessary to consider the standing of the Complainant to sue.

It is, therefore, this 31st day of August, 1970, by the Circuit Court for Worcester County, Maryland, ORDERED that:

1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Society" and R. Doyle Grabarck, President, and Individually, on January 26, 1970, is DENIED;

2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;

3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., on March 11, 1970, is DENIED;

4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;

5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED;

6. The Demurrer of Dependant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complainant to amend;

7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend; and

8. The "Motion of Complainant for Summary Judgment Upon Same Issues" filed by the Complainant on May 11, 1970, being more in the nature of a Demand for Admission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been conceded in the absence of any response thereto by the Defendants; and

9. The Complainant shall pay the costs of this proceeding.

DANIEL T. PRETTYMAN,
Judge

TRUE COPY, TEST: Frank W. Hales, Clerk

DOCKET ENTRIES

1969, Sept. 30. Bill of Complaint for a Mandatory Injunction, and for Declaratory Relief and Interrogatories to the Defendant Board, filed.

1969, Sept. 30. Subpoena with copies issued, together with copies of Bill of Complaint for a Mandatory Injunction, and for Declaratory Relief and Interrogatories to the Defendant Board attached and mailed to the Sheriff of Baltimore City and delivered to the Sheriff of Worcester County for service.

"Summoned James B. Caine, Inc., by service upon James B. Caine and Maryland Marine Properties, Inc., by service upon Raymond D. Coates severally by leaving with each of them a copy of the Writ, together with Bill of Complaint for Mandatory Injunction and a Declaratory Relief Interrogatories to the Defendant Board attached this 30th day of September, 1969. So ans." R. Calvin Hall, Sheriff, By: James N. Jarman, Deputy Sheriff.

"Non Est as to Hon. Marvin Mandel, Governor", J. Mufken, Frank J. Pelz, Sheriff.

"Copy of the Process with a copy of Bill of Complaint served on Francis B. Burch, Esq., Attorney General of Maryland at One Charles Center, at 2:05 P.M. on the first day of October, 1969, in the presence of Sol Damoff", Frank J. Pelz, Sheriff.

1969, Oct. 9. Second Subpoena with copy issued, together with a copy of Bill of Complaint for a Mandatory Injunction and for Declaratory Relief and Interrogatories to the Defendant Board attached and mailed to the Sheriff of Baltimore City for service on the Governor.

1969, Oct. 20. Demurrer of Defendant, Maryland Marine Properties, Inc., and Certificate of Service thereon, filed.

1969, Oct. 20. Memorandum of Law of Defendant, Maryland Marine Properties, Inc., in Support of Demurrer, filed.

1969, Oct. 21. Demurrer of Defendant Board of Public Works and Certificate of Service thereon, filed.

1969, Oct. 21. Motion Raising Preliminary Objection, Request for Hearing and Certificate of Service thereon, filed.

"Summoned Honorable Marvin Mandel, Governor, and a copy of the process with a copy of the Bill of Complaint left with the defendant at 301 W. Preston St., at 12:30 P.M. on the 27 day of October, 1969 in the presence of John Nuller, III", Frank J. Pelz, Sheriff.

1969, Nov. 6. Reply to "Memorandum of Law of Maryland Marine in Support of Demurrer" and certificate of service thereon, filed.

1969, Nov. 7. Motion Ne Recipiatur to Demurrer of Maryland Marine. Memorandum of Authorities and Certificate of Service thereon, filed.

1969, Nov. 17. Answer to Motion Raising Preliminary Objection, Memorandum of Authority and Certificate of Service thereon, filed.

1970, Jan. 26. Petition to Intervene as Plaintiffs, Affidavit, and Certificate of Service thereon, filed.

1970, Jan. 26. Unsigned Order to Show Cause, filed.

1970, Jan. 26. Order to Show Cause filed. Copies of Petition, Affidavit and Show Cause Order mailed to Hon. Marvin Mandel, the Governor of the State of Maryland, Louis L. Goldstein, Comptroller of Treasury, John Leutkemeyer, Treasurer, Board of Public Works of Maryland, James B. Caine, Inc., Ocean City, Maryland, and Maryland Marine Properties, Inc., Ocean City, Maryland.

1970, Feb. 24. Answer of Defendant, Maryland Marine Properties, Inc., to Petition to Intervene and Certificate of Service thereon, filed.

1970, Feb. 27. Motion Ne Recipiatur as to Petition to Intervene as Plaintiffs and Certificate of Service thereon filed.

1970, March 11. Motion Ne Recipiatur, Memorandum of Rules in Authority and Certificate of Service thereon filed. Copy of same delivered to Lee W. Bolte, Esq.

1970, March 16. Copy of Motion Ne Recipiatur, Memorandum of Rules in Authority, and Amended Certificate of Service thereon filed.

1970, April 8. Letters written to: Hon. F. B. Burch and Jon F. Oster, Esq., L. W. Bolte, Esq., R. A. Shelton and T. P. Perkins, III, Esqs., R. D. Coates, Esq., R. M. Pollitt, Esq., and Leonard J. Kerpelman, Esq., setting case for Argument on all Demurrers, Motions, Petitions &c., filed as of the date of this notice, on Monday, May 11, 1970, at 10:00 A.M., per copies of letters filed.

1970, April 13. Receipt of notification of assignment date from Robert A. Shelton and Thomas P. Perkins, III, Esqs., filed.

1970, April 13. Receipt of notification of assignment date from Lee W. Bolte, Esq., filed.

1970, April 13. Receipt of notification of assignment date from Raymond D. Coates, Esq., filed.

1970, April 24. Receipt of notification of assignment date from Leonard J. Kerpelman, Esq., filed.

1970, April 24. Letter from Leonard J. Kerpelman, Esq., to Frank W. Hales, Clerk, filed.

1970, April 24. Copy of letter from Richard H. Outten, Assignment Clerk to Leonard J. Kerpelman, Esq., filed.

1970, May 5. Plaintiff's Memorandum of Law, Table of Contents, and Certificate of Service thereon filed.

1970, May 6. Memorandum of Law of Defendant James B. Caine, Inc., and Certificate of Service thereon filed.

1970, May 11. Motion for summary judgment upon some Issues, Affidavit and Certificate of Service thereon, filed.

1970, May 11. Judge Daniel T. Prettyman on the Bench. Dave Dawson reporting.

1970, May 11. Leonard J. Kerpelman, Lee W. Bolte, Jon Oster, Raymond D. Coates, Thoman P. Perkins, III, Esqs. in Court.

1970, May 11. Hearings and Argument had on all preliminary Demurrers, Motions and Petitions filed as of this date. Rulings held sub-curia.

1970, May 11. The Motion for summary judgment upon some issues filed May 11, 1970, at 9:30 A.M., is reserved for future Argument and disposition.

1970, May 15. Answer to Memorandum of Law of Defendant James B. Caine, Inc., and Certificate of Service thereon filed.

1970, June 17. Supplementary Plaintiff's Memorandum of Law, and Certificate of Service filed.

1970, Aug. 31. Ordered that:—

1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Society and R. Doyle Grabarck, President and Individually, on January 26, 1970, is DENIED;

2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;

3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant, James B. Caine, Inc., on March 11, 1970, is DENIED:

4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;

5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED:

6. The Demurrer of Defendant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complaint to amend;

7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend;

8. The "Motion of Complainant for summary judgment upon same Issues" filed by the Complainant on May 11, 1970, being more in the nature of a Demand for Admission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been conceded in the absence of any response thereto by the Defendants; and

9. The Complainant shall pay the costs of this proceeding, per Opinion and Order for Court filed. Copies of the Opinion and Order of Court mailed to Leonard J. Kerpelman, Esq., Jon F. Oster, Esq., Asst. Attorney General, Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., and to Thomas P. Perkins, III, Esq.

1970, Sept. 2. Demurrer of Defendant James B. Caine, Inc., and Certificate of service filed.

1970, Sept. 2. Answer to Petition to Intervene and Certificate of Service filed.

1970, Sept. 22. ORDERED that, for the reasons assigned in the Opinion and Order of this Court filed on August 31, 1970, which said Opinion is specifically incorporated herein, by reference thereto, as though fully set forth herein, the "Petition To Intervene as Plaintiffs" filed by the "North American Habitat Preservation Society" and R. Doyle Grabarck, on January 26, 1970, be, and the same is hereby DENIED, and the Demurrer of James B. Caine, Inc., be, and the same is hereby, SUSTAINED, without leave to the Complainant to amend, per Order of Court, filed. Copies of Order of Court mailed to Leonard

J. Kerpelman, Esq., Jon F. Oster, Esq., Asst. Attorney General, Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., and Thomas P. Perkins, III, Esq.

1970, Sept. 29. Order for Appeal and Certificate of Service filed.

1970, Oct. 1. Photo copy of Amended Statement of costs dated October 1, 1970, mailed to Leonard J. Kerpelman, Esq., Hon. Francis B. Burch, Jon F. Oster, Esq., Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., Thomas P. Perkins, III, Esq, and Robert A. Shelton, Esq., Copy of Amended Statement of costs filed.

1970, Oct. 5. Letter dated October 1, 1970, from Leonard J. Kerpelman Esq., Baltimore, Maryland, to David Dawson, Court Reporter, filed.

1970, Oct. 7. Letter from Leonard J. Kerpelman, Esq., to Clerk, Worcester County Court, reply of Clerk at bottom of letter, copy of statement of costs dated Sept. 2, 1970, and copy of Amended Statement of costs dated October 1, 1970, filed. Copy of said letter, reply and statements of costs mailed to Leonard J. Kerpelman, Esq.

1970, Oct. 8. Photo. copy of Notice advising attorneys of record the case is ready for inspection and transmission to the Court of Appeals, mailed to Leonard J. Kerpelman, Esq.; Hon. Francis B. Burch; Hon. Jon. F. Oster; Richard M. Pollitt, Esq.; Lee W. Bolte, Esq.; Raymond D. Coates, Esq.; Thomas P. Perkins, III, Esq.; and Robert A. Shelton, Esq., per original notice, filed.

1970, Oct. 26. Order to enter an appeal to the Court of Appeals of Maryland from the Judgment of the Court dated Sept. 22, 1970, per Order filed.

ORDER OF COURT [SEPT. 22, 1970]

On September 2, 1970, the Defendant, James B. Caine, Inc., filed its "Answer To Petition To Intervene" and a "Demurrer" to the Bill of Complaint filed herein. The

same having been duly read and considered, it is this 22nd day of September, 1970, by the Circuit Court for Worcester County, Maryland, under the authority contained in Maryland Rule 1210 c, ORDERED that, for the reasons assigned in the Opinion and Order of this Court filed on August 31, 1970, which said Opinion is specifically incorporated herein, by reference thereto, as though fully set forth herein, the "Petition To Intervene As Plaintiffs" filed by the "North American Habitat Preservation Society" and R. Doyle Grabarck, on January 26, 1970, be, and the same is hereby, DENIED, and the Demurrer of James B. Caine, Inc., be, and the same is hereby, SUSTAINED, without leave to the Complainant to amend.

DANIEL T. PRETTYMAN,
Judge

MOTION TO DISMISS APPEAL

James B. Caine, Inc., Appellee, by Sanford and Bolte, its Attorneys, moves this Honorable Court, pursuant to Maryland Rule 835, subsection b (3), that this Appeal be dismissed as to said Appellee. The grounds of the Motion are as follows:

1. No Order for Appeal was filed with the Clerk of the Court below within thirty (30) days from the date of the Order appealed from, as prescribed by Maryland Rule 812, the aforesaid Order in favor of the Defendants, having been enterd on September 22, 1970, and the Appeal therefrom having been filed on October 26, 1970. The Appeal should therefore be dismissed under Rule 835, subsection b (3).

Appellee further desires that this Motion be set down for oral argument in advance of the argument on the merits. Said Appellee believes that the grounds of the Motion are such that the disposition of this Motion will make argument on the merits unnecessary as to said Appellee.

SANFORD AND BOLTE

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1970

No. 364

ELINOR H. KERPELMAN,

Appellant,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,

Appellees.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY
(DANIEL T. PRETTYMAN, Judge)

BRIEF OF APPELLEE, MARYLAND MARINE PROPERTIES, INC.

THOMAS P. PERKINS, III,
ROBERT G. SMITH,
VENABLE, BAETJER AND HOWARD,
Attorneys for Appellee,
Maryland Marine Properties, Inc.

The Daily Record Co., Baltimore, Md. 21203

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APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY

(DANIEL T. PRETTYMAN, Judge)

BRIEF OF APPELLEE, MARYLAND MARINE PROPERTIES, INC.

STATEMENT OF THE CASE

This is an appeal from the Opinion and Order of the Circuit Court for Worcester County (Prettyman, J.) dated August 31, 1970 (E. 11). The Order appealed from sustains, without leave to amend, the demurrers of Appellees Maryland Marine Properties, Inc. and Board of Public Works of Maryland to the Bill of Complaint filed below (E. 1). The Bill of Complaint sought the issuance of a

mandatory injunction to force the reconveyance of the State's interest in 197 acres of wetlands allegedly conveyed by the Board of Public Works to Maryland Marine Properties in 1968. The other rulings of Judge Prettyman set forth in the Order of August 31, 1970 are not challenged in the brief of the Appellant filed herein.

Appellant has also noted an appeal from the Order of the Circuit Court for Worcester County (Prettyman, J.) dated September 22, 1970. This Order sustained the demurrer of Defendant James B. Caine, Inc. (E. 30). On November 16, 1970, however, this Honorable Court granted a motion to dismiss the Caine appeal.

QUESTIONS PRESENTED

1. Does Appellant have standing to sue in this case?

2. Has Appellant sufficiently alleged grounds which would subject to judicial review the discretionary action of the Board of Public Works challenged in the Bill of Complaint?

3. Does Section 15 of Article 78A of the Annotated Code of Maryland contravene any provision of the Maryland Constitution?

4. Is Appellant barred by laches?

STATEMENT OF FACTS

The facts alleged in the Bill of Complaint which affect Appellee Maryland Marine Properties, Inc. are set forth below. These facts are, of course, accepted for the purposes of the demurrers.

First, Appellant is a taxpayer and resident of Baltimore City. Second, in 1968, the Board of Public Works of Maryland, acting in accordance with the authority vested in

it by the then applicable provisions of Section 15 of Article 78A of the Annotated Code of Maryland (1965 Repl. Vol.), conveyed the State's interest in 197 acres of marsh lands, wetlands and shallows located in Worcester County, Maryland to the riparian owner, Appellee Maryland Marine Properties, Inc. in exchange for marsh lands worth $41,000. Third, the Bill of Complaint further alleges that Appellee Maryland Marine Properties, Inc. is filling in the lands in question.

There is no allegation in the Bill of Complaint that Appellee has failed to obtain all permits which were required at such time by the appropriate federal, state and local authorities having jurisdiction in the premises. Further, there is no allegation that the challenged transaction or the filling operations will in any way affect navigation or will in any way affect fishing in the bay other than the most extreme speculation, unsupported by any factual allegations, that this particular transaction will have the direst consequences to the entire Maryland ecological system.

Additional facts are alleged with regard to a transaction between the Board of Public Works of Maryland and James B. Caine, Inc., a Defendant below. This Defendant is no longer a party to this appeal. Other than the factual allegations recited above, the Bill of Complaint consists entirely of legal argument and mere conclusions.

ARGUMENT

I.

APPELLANT DOES NOT HAVE STANDING TO CONTEST THE CONSTITUTIONALITY OF SECTION 15 OF ARTICLE 78A OR TO CHALLENGE THE TRANSACTION ENTERED INTO IN THIS CASE PURSUANT TO SUCH STATUTE.

Appellant seeks in this case a mandatory injunction to set aside a transaction between Appellee Maryland Marine

Properties, Inc. and Appellee Board of Public Works of Maryland affecting property in Worcester County, Maryland and entered into strictly in accordance with express statutory authority. The court below did not reach the question of standing inasmuch as the demurrers were sustained on other grounds (E. 23). The question of standing, however, is a threshold question and should be considered at the outset, because it is determinative of this case.

Further, this Court has already ruled on this very point in a similar case. In *Board of Public Works v. Larmar* (No. 345, September Term, 1970), which is currently pending before this Court, the Appellant, Mrs. Kerpelman, filed a petition to intervene in the lower court. Her allegations of standing in *Larmar* were the same as the allegations in this case. The lower court ruled that Mrs. Kerpelman lacked standing and this decision was affirmed by this Court. *Kerpelman v. Larmar* (No. 412, September Term, 1969; appeal dismissed March 3, 1970).

Appellant does not allege standing in this case based upon any statutory provision. She does not allege that she has any special interest of any kind in the transaction which she questions. Indeed, she alleges that she is in fact not even a resident of Worcester County, but a resident of Baltimore City, conceding that she has no interest of any kind in this case other than as a member of the general public residing in the State of Maryland. Her standing is alleged purely as a taxpayer and also as a general beneficiary of an alleged public trust. These theories will be considered separately below.

A. *Standing as a taxpayer*

In the first paragraph of the Bill of Complaint, Appellant states that her standing to sue is based upon the fact that she is a taxpayer. As indicated above, this allegation is

made all the more tenuous by the fact that she is not even a taxpayer of Worcester County, where the property in question is located.

In the most recent case in point, *Stovall v. Secretary of State,* 252 Md. 258 (1969), this Court affirmed the decision of the lower court sustaining a demurrer to a taxpayer's suit due to the lack of the standing of the plaintiff to sue. The *Stovall* case concerned a matter of considerable public concern and attention, the transfer of control over Morgan State College. Judge McWilliams stated the applicable rule as follows:

> "In Maryland taxpayers have standing to challenge the constitutionality of a statute when the statute as applied increases their taxes, but if they cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to make such a challenge." (252 Md. at 263).

See also *Murray v. Comptroller,* 241 Md. 383, 391 (1966); *Citizens Committee v. County Commissioners,* 233 Md. 398 (1964); *Baltimore v. Gill,* 31 Md. 375, 394 (1869). In *Stovall,* Judge McWilliams cited with approval the following passage from the *Citizens Committee* case:

> "While the appellants claim that the carrying out of the provisions of the alleged unconstitutional and invalid laws, ordinances and resolutions, has resulted in loss and damage to them and all other taxpayers in the county, they have failed to prove or show any special damage or loss which is peculiar to themselves as taxpayers or otherwise." (233 Md. at 400).

Appellant fails to allege any facts in the Bill of Complaint establishing a valid taxpayer interest. In the *Murray* case, *supra,* Judge Oppenheimer found that the Plaintiff did have standing inasmuch as it was clear that if church-owned property, the subject matter of the suit, were placed

on the tax rolls, property taxes for individual property owners such as Mrs. Murray, would be reduced. Appellant makes no such allegation here. In fact, the only allegations are directly to the contrary. In paragraph 6 of the Bill of Complaint, Appellant admits that the transactions which she challenges will actually increase the state tax base by putting additional property on the tax rolls. Despite this concession, which is decisive on this issue, Appellant engages in totally unsupported speculations in a futile attempt to establish standing as a taxpayer. She predicts that the conveyance of the relatively small acreage of wetlands challenged in this case will have immediate and dire consequences to the entire marine ecology of the State of Maryland. These speculations are not supported by a single allegation of fact.

The only relevant facts alleged in the Bill of Complaint are that this case concerns the State's interest, if any, in 197 acres of riparian wetlands, which were exchanged for marsh lands which Appellant concedes to be worth at least $41,000, thereby actually increasing the inventory of such property in state ownership and control.

Despite the wild predictions in the Bill of Complaint, it remains clear that this appeal concerns only 197 acres of wetlands whereas in the State of Maryland there are 3,190 *miles* of tidal shore line supporting such wetlands, Hall of Records Commission, *Maryland Manual, 1969-1970*, p. 23 (1970), and whereas there are more than 300,000 acres of swamp and marshes in the State of Maryland (II Maryland State Planning Department, *Wetlands in Maryland — Technical Report* V-I (1970)). In view of these facts and statistics, no one could seriously contend that the specific transaction challenged here could have such an impact on marine ecology as to adversely affect the interests of Maryland taxpayers and thereby create standing to sue.

It is clear from the Bill of Complaint that what the Appellant is really concerned about is not the particular transaction challenged in this case, but the long-range policy of the State of Maryland with regard to the preservation of wetlands. The proper forum in which to resolve these broad issues of public policy is the Legislature. Appellant must take solace in the fact that since this suit was filed the Legislature, at its 1970 session, totally revised the laws in this area.

B. *Standing to sue as a general beneficiary of a public trust.*

In paragraphs 2 and 3 of the Bill of Complaint, Appellant also seems to base her standing as a general beneficiary of an alleged public trust, citing as her authority Article 6 of the Declaration of Rights of the Constitution of Maryland. This Article provides in material part "all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, accountable for their conduct. . . ."*

As set forth above, the Maryland law with regard to standing has been fully articulated in numerous opinions of this Court. To challenge the constitutionality of a statute or the application of a statute, the litigant must show a taxpayer interest or a special interest in the subject matter other than that of the general public. No Maryland case has ever established standing on the novel theory suggested here. To adopt such a theory would

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* Interestingly enough, Article 6 goes on to indicate that the remedy afforded to a citizen for a breach of the public trust is not litigation but revolution, the framers philosophizing:

> "Wherefore, whenever the ends of Government are perverted . . . the People may, and of right ought, to . . . establish a new Government; the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind." Md. Decl. of Rights, Art. 6.

constitute a significant departure from the consistent pattern of Maryland law developed from *Baltimore v. Gill, supra,* through *Stovall v. Secretary of State, supra.* Under the Maryland Constitution, the Board of Public Works and all other agencies are trustees of the public in all that they do. If Appellant has standing to sue as a general beneficiary of an intangible trust in this case, then every public action is subject to judicial review at the suit of any resident. A resident of Worcester County, for example, may bring suit to enjoin the action of the Mayor and City Council of Baltimore in closing a public street. More significantly, the Plaintiffs in the *Stovall* case would clearly have had standing to challenge as important a public action as the determination of the future academic role of Morgan State College. This Court, however, has wisely placed restraints on the use of the courts to contest the actions of other branches of government. These restraints should be kept in force. Inasmuch as the Appellant lacks standing to sue, the judgment appealed from should be affirmed on this basis.

II.

THE ACTION OF THE BOARD OF PUBLIC WORKS CHALLENGED IN THIS CASE WAS A PROPER EXERCISE OF A CONSTITUTIONAL STATUTORY POWER.

A. *Appellant has failed to allege facts which would subject to judicial review the action of the Board of Public Works challenged in the Bill of Complaint.*

In this case, Appellant seeks the extreme equitable remedy of a mandatory injunction to force the reconveyance of the State's interest in riparian property in accordance with action taken by the Board of Public Works in 1968. Although the courts of this State have the power to grant such relief (Maryland Rule BB 70a), it is a well established principle of equity that this power will only

be exercised with the greatest caution. *Maryland Trust Co. v. Tulip Realty Co.*, 220 Md. 399, 412 (1959).

In paragraph 3 of the Bill of Complaint, Appellant alleges that in 1968 the Board of Public Works agreed to transfer the interest of the State in 197 acres of submerged land to the riparian owner, Maryland Marine Properties, Inc. Appellant concedes that this transaction was made in accordance with the express statutory authority granted by the Legislature to the Board of Public Works pursuant to the then applicable provisions of Section 15 of Article 78A of the Annotated Code of Maryland (1965 Repl. Vol.). This statute is both broad and specific with regard to the grant of power to the Board in this instance. It gives the Board power to convey any interest of the State in real or personal property "for a consideration adequate in the opinion of the Board of Public Works." Property may be transferred to or may be exchanged with any person or corporation and the term real or personal property or any interest therein expressly includes "the inland waters of the State and land under said waters."

The Bill of Complaint makes it clear that an exchange was made pursuant to the statute. There is no allegation that the consideration was not considered adequate in the opinion of the Board of Public Works. There is no allegation that there was any procedural irregularity of any kind in connection with this transaction.

In order to obtain judicial review of the action of the Board of Public Works challenged in this case, it is clear that Appellant must show that the Board's discretionary power was fraudulently or corruptly exercised. *Hanna v. Board of Education*, 200 Md. 49, 51 (1952); *Coddington v. Helbig*, 195 Md. 330, 337 (1950). The leading case with regard to discretionary actions of the Board of Public Works is a lower court opinion which states the same

principle of law set forth above. *Terminal Construction Corp. v. Board of Public Works* (Cir. Ct. of Baltimore City, *Daily Record,* July 29, 1957).

Appellant does not allege any facts to support her contention in the Bill of Complaint that the Board of Public Works acted fraudulently in this case. Indeed, she appears to have abandoned this contention in her brief on appeal. Fraud is a most serious charge, particularly when made against the Governor, the Comptroller and the Treasurer of the State of Maryland. It should be supported by substantial factual allegations which are totally absent here. Therefore, the merits of the action of the Board challenged in this case are not subject to judicial review.

B. *The provisions of Section 15 of Article 78A in effect in 1968 did not contravene any provision of the Maryland Constitution.*

The main thrust of the argument advanced in Appellant's brief is that Section 15 of Article 78A of the Annotated Code of Maryland (1965 Repl. Vol.), as it existed in 1968, is unconstitutional. She argues that the legislative and administrative branches of government are powerless to enact laws and to enter into agreements which would in any way affect Maryland's tidelands. It is most significant that under her theory, the 1970 revisions of the laws in this area, as enacted by the General Assembly, are equally as unconstitutional as the statute challenged in this case.

Appellant's constitutional theory is the invention of what she considers to be necessity. Her Bill of Complaint reflects her personal sense of frustration in the ability of anyone other than the courts to consider the interests of the public in tidewater and wetland areas. On the contrary, legislative concern on these issues has been and is

continuing to develop rapidly, but it is significant that it was very much in evidence at the time of the particular transaction which is the subject matter of this suit. In this regard, it should be helpful to review the federal, state and local regulatory pattern as it existed in 1968.

Under the provisions of the Rivers and Harbors Act, 33 U.S.C.A. §403 (1970), no filling or bulkheading of any kind in tidal waters may be commenced without the prior approval of the U. S. Army Corps of Engineers, in order to protect the interests of navigation. Further, prior to granting approval for any such activities, the Corps of Engineers was and is required by law to consult with the U. S. Fish and Wild Life Service of the Department of the Interior "with a view to the conservation of wild life resources." 16 U.S.C.A. §662 (a) (1960). Therefore, the interests of navigation and conservation must be considered by the appropriate federal authorities before the type of activities about which Appellant complains may be carried out. In addition, fill and bulkhead activities were subject in 1968 to the issuance of a permit from the Maryland State Department of Water Resources pursuant to the provisions of Section 12 of Article 96A of the Annotated Code of Maryland (1970 Supp.) and the approval of the Worcester County Shoreline Commission by virtue of the provisions of Sections 15A and 15B of the Code of Public Local Laws of Worcester County (1961 Edition and 1968 Supp.). There is no allegation in the Bill of Complaint that Appellee failed to obtain any and all such approvals before commencing filling operations or that these agencies shared her conviction that the particular transaction challenged here would have a serious impact on Maryland's ecological system.

In considering the constitutionality of Section 15 of Article 78A, it is also essential to determine what property

rights, if any, the State surrendered to the riparian owner, Maryland Marine Properties, Inc. in the transaction challenged in this case. If none were in fact given up, Appellant has no cause for complaint and the constitutional argument is moot.

This Court presently has before it the important case of *Board of Public Works v. Larmar* (No. 345, September Term, 1970). In *Larmar,* Judge Prettyman held that the riparian owner was free to fill wetlands and bulkhead out to the established bulkhead line without paying any compensation to the State and subject only to the prior approval of the Worcester County Shoreline Commission. Judge Prettyman held that once having filled the land, the riparian owner has vested title to the fee, free and clear of the right and claim of the State of Maryland or of any other person, firm or corporation.

This brief is not the place to reargue the *Larmar* case. The leading case is *Goodsell v. Lawson,* 42 Md. 348 (1875) where this Court held that fee simple title to the site of what is now a substantial part of the town of Crisfield was created by virtue of the filling in of submerged land. The only difference was that oyster shells were used a century ago to make new fast land, instead of sand and mud. *Goodsell* and other Maryland precedents appear to support the conclusions reached by Judge Prettyman in the *Larmar* case.

Also directly in point is the recent opinion of Judge Thomsen in the Assateague Island condemnation cases, *U. S. v. 222.0 Acres of Land,* 306 F. Supp. 138, 156 (D. Md. 1969). After a careful analysis of the Maryland law, Judge Thomsen concluded that the riparian owners, who had filled in land after obtaining the necessary permits, but without compensation to the State, held title to the land

in fee simple, subject only to the paramount right of the United States to protect navigation and the right of the State to condemn land for a public purpose.

If this Honorable Court affirms the *Larmar* decision, it necessarily follows that this case must also be affirmed. It would then be clear that the State had no property interest to convey to Maryland Marine Properties, Inc. and that the transaction challenged here was just icing on the cake, with the State getting, in effect, something for nothing.

Even if this Court rules, however, that in order to obtain clear title, the Larmar Corporation was required to obtain all necessary permits and/or to acquire the State's interest in submerged land, this case must still be affirmed. It is clear in this case that Maryland Marine Properties, Inc. has never challenged the regulatory powers of the State as did the Larmar Corporation. In fact, this Appellee not only obtained the necessary permits, but, as set forth in the Bill of Complaint, actually conveyed marshlands to the State in exchange for the residual interest, if any, which the State might have possessed in the land filled by Appellee. Again, it is significant that Judge Thomsen held in the Assateague Island cases that a riparian owner who obtains the necessary permits acquires clear title to the filled land without the necessity of paying any compensation to the State.

Appellant, in her brief, ignores the entire body of Maryland law on the subject. She instead contends that Section 15 of Article 78A is unconstitutional. There is no possible question of federal constitutional law involved here. The Supreme Court has held that the delineation of riparian rights is subject to the determination of the individual states. *Shively v. Bowlby*, 152 U.S. 1 (1894).

In support of her constitutional argument, the only provision of the Maryland Constitution to which Appellant refers is Article 6 of the Declaration of Rights. This provision, as discussed above, merely contains a general statement that all public officials are trustees of the public in all that they do. Appellant argues primarily that her "inalienable" property right in the land in question here is a permanent and immutable element of the common law. In support of this novel doctrine, she cites no Maryland authorities, but only cases from other jurisdictions. Judge Prettyman properly rejected this theory in his opinion below.

A careful reading of the cases upon which Appellant relies in her brief makes it clear that these cases do not support her theory. On page 3 of her brief, Appellant places her main reliance upon *Commonwealth of Virginia v. City of Newport News*, 158 Va. 521, 164 S.E. 689 (1932). In this case, the Commonwealth of Virginia brought suit to restrain the City of Newport News from dumping untreated sewage into Hampton Roads and thereby polluting the oyster beds in the Roads and its estuaries. The City filed a demurrer which was sustained. This ruling was affirmed on appeal. In the Virginia case, the Court stated that it had given no consideration as to whether the right of navigation is a part of the *jus publicum*. This question was not before the Court, because the activity complained of did not interfere with navigation (158 Va. at 548, 164 S.E. at 697). Similarly, there is no allegation of any interference with navigation in this case.

The Virginia Court did hold, however, that the use and enjoyment by the people of the Commonwealth of tidal waters and their bottoms for the purpose of taking fish and shell fish is an incident of the *jus privatum* of the State and not of the *jus publicum*. This holding is, of

course, directly contrary to the basic contention of the Appellant. The Virginia Court expressly held that the State Legislature has the right to permit its tidal waters or their bottoms to be used for purposes which impair or even destroy their use for the purposes of fishery and may lease or sell to private persons portions of its tidal bottoms with the right to use them for private purposes to the exclusion of the use of the waters for purposes of fishery (158 Va. at 552-553, 164 S.E. at 698-699).

The second case relied upon by Appellant is *Illinois Central R. R. v. Illinois,* 146 U.S. 387 (1892). It is extremely significant that in the course of this lengthy opinion, the Court expressly held that the railroad's ownership in fee of several lots on the lakeshore gave it the right, as riparian owner, to fill in the shallows in front of these lots up to the point where the lake became navigable (146 U.S. at 446). This, of course, is all that Maryland Marine Properties, Inc. is alleged to have done in this case.

The primary issue in the *Illinois Central* case concerned the question of title to approximately 1,000 acres of the bed of Lake Michigan, which constituted virtually the whole of the Chicago harbor, extending a mile from the shore. The Court held that the railroad did not have title to this acreage inasmuch as a Legislative grant of the land had subsequently been repealed. These broader aspects of the *Illinois Central* case bear no resemblance to the factual allegations of the case at bar.

Judge Prettyman held in this case that whatever the status of the common law on the subject, it is fundamental that the Legislature has the power to change or amend the common law. This the Legislature clearly did by enacting Section 15 of Article 78A. The powers delegated to the Board of Public Works can, of course, be modified, as was done by the 1970 Legislature or these powers can be re-

voked. Further, the rights of riparian owners can also be substantially modified as was also done by the 1970 Legislature. The Legislature is the proper forum in which to resolve the important questions presented in balancing the interest of conservation on the one hand against the interest of the State in encouraging development. There is, of course, a public interest, or trust in a very broad sense, in the preservation of wetlands. It is the function of the Legislature to delineate the nature and extent of this public interest or trust.

Appellant seeks to resolve judicially broad issues of public policy. She asks this Court to adopt retroactively a legal doctrine which has never been applied in Maryland, which is contrary to the express policy established by the Legislature, and which requires the Court to adopt a totally unorthodox approach to constitutional law. Further, even if the theory were adopted as an abstract proposition, it is difficult to see how it would entitle her to the relief requested in this case.

More important, if Appellant's theory were adopted, riparian property owners would be absolutely prohibited from all bulkheading and filling activities, the Legislature would be precluded from passing laws in this important area and the title to vast acreages of reclaimed land throughout Maryland would be placed in jeopardy. And to what purpose? As Judge Prettyman observed, it is impossible to undo what has already been done. As he stated in his opinion below:

> ". . . it might be an interesting mental exercise to conceive of replacing the shorelines of The State of Maryland to their composition and contour, and in all their pristine beauty, of the year 1634. Such would be the logical, if unreasonable, result should the theory of the Complainant be adopted, and the requested 'Mandatory Injunction' issued by this Court." (E. 23).

The extreme theory of the public trust, with all its implications, as advanced by the Appellant is not sound. It is not, and should not be, the law of Maryland.

III.

APPELLANT IS BARRED BY LACHES.

On September 30, 1969, Appellant filed this suit challenging transactions of the Board of Public Works which she states in her Bill of Complaint were completed in 1968. The Board of Public Works is a public body. Its statutory powers are exercised and performed in public session and are fully subject at such time to public scrutiny. Nevertheless, Appellant delayed for more than a year the filing of a suit to challenge the agreements entered into by the Board of Public Works in 1968. Further, she belatedly attacks the right of a riparian property owner to develop shoreline property when it is clear that the property owner, Maryland Marine Properties, Inc., complied with all federal, state and local laws which were applicable at the time prior to the commencement of development.

It is a well accepted maxim that equity "aids the vigilant and will not give relief to a person who has been dilatory in bringing his cause of action." *James v. Zantzinger,* 202 Md. 109, 116 (1953). In the recent case of *Parker v. Board of Election Supervisors,* 230 Md. 126 (1962), this Court upheld the ruling of the trial court sustaining a demurrer and dismissing an action in an election case on the grounds of laches. The court observed that laches is a "defense in equity against stale claims, and is based upon grounds of sound public policy by discouraging fusty demands for the peace of society." (230 Md. at 130).

The above quotation is particularly applicable to the allegations set forth in the Bill of Complaint in this case. Appellant belatedly seeks to reopen matters which have long since been properly closed. Her motive in so doing is to challenge state policy. Her real concern is the future application of such policy rather than with its application to the transaction questioned in this case. If this transaction were to be challenged at all, it should have been challenged at the time it was consummated, in 1968, and not more than a year later. Although the Court below was not required to reach this point, it is clear that this suit is barred by laches and that the demurrers could have been sustained on this basis alone.

CONCLUSION

For the foregoing reasons, the judgment appealed from should be affirmed.

Respectfully submitted,

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Attorneys for Appellee,
Maryland Marine Properties, Inc.

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1970

No. 364

ELINOR H. KERPELMAN,

Appellant,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,

Appellees.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY
(DANIEL T. PRETTYMAN, Judge)

BRIEF OF APPELLEE, BOARD OF PUBLIC WORKS OF MARYLAND

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BRIEF OF APPELLEE, BOARD OF PUBLIC WORKS OF MARYLAND

STATEMENT OF THE CASE

The Appellee, Board of Public Works of the State of Maryland, accepts the Statement of the Case as set forth in Brief of Appellee, Maryland Marine Properties, Inc.

QUESTIONS PRESENTED

1. Whether the action of the Board of Public Works in conveying certain marshlands and wetlands of the State

pursuant to its authority to dispose of lands of the State provided in Section 15 of Article 78A of the Annotated Code of Maryland may be subject to judicial review in the absence of an allegation of fraud or corruption?

2. Whether lands owned by the State under its navigable waters are held by the State in trust as an incident of the *jus publicum* and as such can not be alienated or disposed of by the State?

STATEMENT OF FACTS

The Appellee, Board of Public Works, adopts the Statement of Facts as set forth in Brief of Appellee, Maryland Marine Properties, Inc.

ARGUMENT

I.

THE ACTION OF THE BOARD OF PUBLIC WORKS IN CONVEYING CERTAIN MARSHLANDS AND WETLANDS OF THE STATE PURSUANT TO ITS AUTHORITY TO DISPOSE OF LANDS OF THE STATE PROVIDED IN SECTION 15 OF ARTICLE 78A OF THE ANNOTATED CODE OF MARYLAND IS NOT SUBJECT TO JUDICIAL REVIEW IN THE ABSENCE OF AN ALLEGATION OF FRAUD OR CORRUPTION.

Section 15 of Article 78A of the Annotated Code of Maryland provides in pertinent part as follows:

> "Any real or personal property of the State of Maryland or of any board, commission, department or agency thereof, and any legal or equitable rights, interests, privileges or easements in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any board, commission, department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public

> Works, or to any county or municipality in the State subject to such conditions as the Board of Public Works may impose. . . . As used herein, the term 'real or personal property or any legal or equitable rights, interests, privileges or easements in, to, or over the same' shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land. . . ."

Pursuant to such authority, certain lands located in Worcester County, portions of which are under the navigable waters of the State, have been sold by the Board of Public Works. In her Bill of Complaint the Appellant alleges that the sale to the Appellee, Maryland Marine Properties, Inc., of 197 acres of State land was for a totally inadequate and insufficient consideration, and that the Board of Public Works "had a mistaken, unreasonable, or totally false opinion of such adequacy" (E. 2).

The proposition is firmly established that when a governing body such as the Board of Public Works, which is clothed with discretionary powers, acts within the powers conferred upon it by law its conclusions even if mistaken will not be reviewed by the courts in the absence of a showing that its power has been fraudulently or corruptly exercised. *Fuller Co. v. Elderkin,* 160 Md. 660, 669 (1931); *Hanna v. Board of Education of Wicomico County,* 200 Md. 49 (1952).

In her Bill of Complaint the Appellant failed to allege fraud or corruption on the part of the Board of Public Works and, accordingly, the Order of the Circuit Court for Worcester County sustaining the Demurrer of the Appellee, Board of Public Works, should be affirmed.

II.

LANDS OWNED BY THE STATE UNDER ITS NAVIGABLE WATERS ARE NOT HELD IN TRUST AS AN INCIDENT OF THE *JUS PUBLICUM* AND CAN BE ALIENATED OR DISPOSED OF BY THE STATE.

The Appellant relies upon the cases of *Commonwealth v. City of Newport News,* 164 S.E. 689 (1932), and *Illinois Central R.R. v. Illinois,* 146 U.S. 387 (1892) in support of her argument that State lands under its navigable waters are held by the State in trust as an incident of the *jus publicum* and as such cannot be alienated or disposed of by the state.

In *Commonwealth v. City of Newport News, supra,* the Supreme Court of Virginia held that the General Assembly of Virginia had the power to authorize the City of Newport News to discharge raw, untreated sewage into the waters of Hampton Roads. It also held that the questions of what extent these waters might be used for sewage disposal; what extent these waters should be devoted to purposes of fishery; and what restrictions and limitations should be placed on these uses were questions committed by the Constitution of Virginia to the discretion of the Legislature free from the control or interference of either the executive or judicial departments of the government.

More important for the purposes of the instant matter, the Supreme Court of Virginia observed that it confused the issue "to discuss the rights of the people to the tidal waters and their bottoms from the standpoint of a trust or limitation imposed by the State Constitution on the state as a sovereign entity." *Supra,* p. 696. Accordingly, the Virginia Court did not consider whether the rights there in question were inherent and inseparable incidents of the governmental power and *jus publicum* of the state and said: "Nor are we considering to what extent that fact, if

it be a fact, operates to limit the power of the Legislature to dispose of tidal waters and their bottoms, or to authorize, permit, or suffer them to be used for other purposes, either private or public." *Supra*, p. 697.

In *Illinois Central R.R. v. Illinois, supra,* the Supreme Court of the United States held that the State of Illinois was the owner in fee of submerged lands constituting the bed of Lake Michigan which an Act of the State of Illinois in 1869 had purported to grant to the Illinois Central Railroad Company, and that a subsequent Act of the State in 1873 repealing the Act of 1869 was valid and effective for the purpose of restoring to the State the same control, dominion and ownership of such lands that the State had prior to the passage of the Act of 1869. This case does contain some rather broad and general statements by Mr. Justice Field concerning the nature of the title which the State held in submerged lands for the people but it is important to bear in mind that Mr. Justice Field's statements were made in light of a factual situation in which the State of Illinois in the Act of 1869 had granted the Illinois Central Railroad Company the submerged land under the harbor of Chicago embracing something more than 1,000 acres.

In the later case of *Shively v. Bowlby,* 152 U.S. 1 (1894), the Supreme Court observed that "[t]he . . . summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore,

is necessary in applying precedents in one state to cases arising in another." *Supra*, p. 26.

Even if the statements of Mr. Justice Field in the *Illinois Central Railroad* case, *supra*, did stand for the proposition that submerged lands of the state are an incident of the *jus publicum* and cannot be alienated, which they do not, the case would not be authority for the application of this principle in Maryland because of the extraordinary facts involved in the *Illinois Central Railroad* case, *supra*, and the subsequent statement of the Supreme Court in *Shively v. Bowlby*, *supra*, that there are no universal and uniform laws concerning state owned land under the tide waters within its borders.

CONCLUSION

For the foregoing reasons the Opinion and Order of the Circuit Court for Worcester County sustaining the Demurrer of the Appellee, Board of Public Works, to the Bill of Complaint of the Appellant without leave to amend should be affirmed.

Respectfully submitted,

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JON F. OSTER,
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